**TENBY WORLD SDN BHD** A

**v.**

**SOH CHONG WAN & ANOR**

HIGH COURT MALAYA, SHAH ALAM B
VERNON ONG J
[JUDICIAL REVIEW NO: 25-133-09-2012]
8 MARCH 2013

***ADMINISTRATIVE LAW**: Exercise of judicial powers - Consumer Claims Tribunal ('CCT') - Whether matters relating to private educational institutions within CCT's jurisdiction - Whether CCT's decision legal and rational* C

The first respondent had enrolled his two sons at an international school operated by the applicant. He paid a total of RM11,300 as deposits for both the children. About 1 1/2 years later, he requested the applicant to D refund the deposits as he wanted to transfer the two children to another private school closer to his home. The applicant said that the deposits were not refundable as was stated in the application form for the children's admission. The first respondent filed a claim for the refund with the Consumer Claims Tribunal ('CCT') which ordered the applicant E to deduct 20% from the total deposits as a penalty and refund the balance RM9,040 to the first respondent within 14 days. In the instant application for judicial review of the CCT's decision, the applicant contended that the CCT's decision was illegal as it had no jurisdiction to decide on matters relating to private education.

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**Held (allowing applicant's application; granting *certiorari* quashing CCT's award):**

**(1)** The CCT had no jurisdiction to hear matters relating to private educational institutions as such matters were governed by the G Education Act 1996 ('EA 1996'). The CCT's decision was clearly illegal. It had not acted within the terms of the powers granted to it and within the bounds of the statutory purpose under the Consumer Protection Act 1999 ('CPA 1999'). (paras 28 & 31)

**(2)** As a private educational institution, the applicant was governed by H the EA 1996. There was in place a complaints mechanism whereby a person could file a complaint with the Private Education Division, under the purview of the Education Ministry, which served as the regulatory body that ensured all private educational institutions were registered and abided by the laws and regulations stipulated by the I EA 1996. The fees imposed by the applicant and the deposits it

collected were approved by the Education Ministry under reg. 17 of the Education (Registration of Educational Institutions) Regulations 1997 and s. 130 of the EA 1996. (paras 25, 26 & 27)

**(3)** As the applicant provided services which were specifically regulated and governed by the EA 1996, the application of the CPA 1999, under which the CCT was established, was expressly excluded and the first respondent's complaint or claim did not fall within the CCT's purview. (para 28)

**(4)** Even if the CCT had the jurisdiction to decide on the fees issue, its decision was flawed and failed the *Wednesbury* unreasonable test. The CCT had ruled that the first respondent failed to give the requisite notice to the applicant to withdraw his sons from the school and that there was no provision allowing the applicant to forfeit the deposits. However, s. 7 of the application form expressly stipulated that one term's notice must be given and that, in default, the deposit would be forfeited. Hence, the decision of the CCT was plainly unsupportable and was against the facts. (paras 29 & 30)

**Case(s) referred to:**

*B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC* ***(refd)***

*Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA* ***(refd)***

*Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC* ***(refd)***

*Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA* ***(refd)***

*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA* ***(refd)***

*Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC* ***(refd)***

*Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA* ***(refd)***

*Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC* ***(refd)***

*Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA* ***(refd)***

*R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***

*Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC* ***(refd)***

*Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390 HC* ***(refd)***

*Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA* ***(refd)***

*Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***

**Legislation referred to:**
Consumer Protection Act 1999, ss. 2(2), (4)
Courts of Judicature Act 1964, s. 25(2)
Education (Registration of Educational Institutions) Regulations 1997, reg. 17
Education Act 1996, ss. 126, 127, 130
Rules of Court 2012, O. 53 r. 2(2)
Specific Relief Act 1950, s. 44

*For the appellant - Nor Hisham Ismail; SFC*
*For the respondent - Phan Yit Leng (Ernest Balasingam with him); M/s Gibb & Co*

*Reported by Ashok Kumar*

## JUDGMENT

**Vernon Ong J:**

**[1]** On 9 January 2013, the court allowed the applicant's application for judicial review of the decision of the consumer claims tribunal in allowing the first respondent's claim for the refund of its entrance deposit pursuant to the application for admission between the applicant and the first respondent. The grounds of the decision are as follows:

### Brief Account Of The Facts

**[2]** The following facts are as disclosed in the affidavit in support (encl. 3) and supplementary affidavit (encl. 6) affidavit evidence filed by the applicant. The first respondent did not file any affidavit in reply to the applicant's affidavits.

**[3]** In September 2009, the first respondent enrolled his two sons at the Tenby International School, a private education institution operated by the applicant. He paid the deposit of RM5,300 for his first son and RM4,600 for his second son. The following year, he paid a top-up of the deposits of RM700 each.

**[4]** On 4 May 2011, the first respondent wrote to the applicant seeking to withdraw his two sons with a view to transferring them to another private school closer to their home. On 11 October 2011, the first respondent wrote to the applicant asking for the refund of the deposit.

**[5]** On 15 November 2011, the applicant wrote to the first respondent informing that the deposit "are not refundable as stated in item 5 of s. 7 of the application for admission form."

**[6]** On 17 April 2012, the first respondent filed a claim for the refund of the deposit at the CCT. After hearing the parties, the CCT made an award requiring the applicant to refund the deposit amounting to RM9,040 to the first respondent within 14 days. In making the award, the CCT allowed a deduction of 20% as a penalty that ought to be deducted from the deposit.

**Judicial Review In Malaysia**

**[7]** Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; [2011] 6 MLJ 507).

**[8]** The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para. 1 of the Schedule to s. 25(2) CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

*Distinction Between Public Law Proceedings And Private Law Proceedings*

**[9]** Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

**[10]** In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

**[11]** In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg, decisions of public bodies concerning Orang Asli native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies *qua* respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, Government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue and Majlis Agama Islam, to name a few.

**[12]** As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

**[13]** Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

**Principles Of Judicial Review**

**[14]** At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In

performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305) The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of *certiorari* where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether *certiorari* will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made *ultra vires*, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court Of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501; [2006] 3 MLJ 493 CA at pp. 526-527 (CLJ) p. 511 (MLJ) Mohd Ghazali JCA (later FCJ) said (emphasis added):

> From the authorities discussed above, I would think that in *dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind*:
>
> (i) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made*;
>
> (ii) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable*;
>
> (iii) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.

(v) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law*;

(vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.*

**[15]** Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v. Ariokianathan Sivapiragasam (supra)*, in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(i) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(ii) the merits where the decision is grounded on illegality or plain irrationality;

(iii) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(iv) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

**[16]** Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789 (FC); *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288 (FC).

**[17]** In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) Procedural impropriety;

(b) Illegality; and

(c) Irrationality.

*Procedural Impropriety*

**[18]** This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] MLJ 69; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85 CA; *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390).

*Illegality*

**[19]** This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and *Anisminic* error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur Gopal Singh v. Hotel Excelsior* [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by *mala fide*. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ

1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 AMR 2265).

*Irrationality*

**[20]** Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

**[21]** A decision which falls on this ground is said to have failed the '*Wednesbury* unreasonableness' test (See *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*, (*supra*)).

*Applicant's Case*

**[22]** The applicant's case is premised on the ground of illegality - in particular to the issue of jurisdiction - (i) whether the CCT have the jurisdiction to hear matters relating to private education; and (ii) whether the CCT have the jurisdiction to decide on an issue relating to fees which are governed by the contract between the school and the first respondent.

*Whether The CCT Have The Jurisdiction To Hear Matters Relating To Private Education?*

**[23]** The CCT is a public body established under the Consumer Protection Act 1999 (CPA 1999). The jurisdiction of the CCT is limited to the extent expressly stipulated in sub-s. (2) of s. 2 CPA 1999; and it provides as follows:

(2) This Act shall not apply.

A (a) to securities as defined in the Securities Industry Act 1983;

(b) to future contracts as defined in the Futures Industry Act 1993;

(c) the contracts made before the date on which this Act comes into operation;

B

(d) in relation to land or interests in land except as may be expressly provided in this Act;

(e) **to services provided by professionals who are regulated by any written law**; and

C

(f) to healthcare services provided or to be provided by healthcare professionals or healthcare facilities. (emphasis added)

**[24]** It is also relevant to note that sub-s. (4) provides that the application of the CPA 1999 shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

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**[25]** As a private educational institution, the applicant is governed by the Education Act 1996 (EA 1996). The Private Education Division under the purview of the Education Ministry serves as the regulatory body in ensuring that all private educational institutions are registered and abide by the laws and regulations stipulated by the EDA 1996; it also ensures an efficient and effective monitoring and enforcement system.

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**[26]** There is in place a complaints mechanism whereby a person can file a complaint by filling a "borang aduan" with the private education division. The procedure for complaints is consistent with the existing regulations promulgated under the CPA 1996. In fact, ss. 126 and 127 of the EA 1996 refers to enquiries and appeals from a decision of the Registrar General in this connection.

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G **[27]** At this point, it is also pertinent to observe that the fees imposed by the applicant and the deposit it collected has been approved by the Education Ministry under Regulation 17 of the Education (Registration of Educational Institutions) Regulations 1997 and s. 130 EA 1996.

H **[28]** It is therefore plain that the applicant is providing services which are specifically regulated and governed by the EA 1996. As such, the application of the CPA 1999 is expressly excluded; and it accordingly follow the first respondent's complaint or claim does not fall within the purview of the CCT; put another way, the CCT has no jurisdiction to hear matters relating to private education. In consequence of the finding, the decision of the CCT is clearly illegal as it had not acted within the terms of power granted to it and within the bounds of the statutory purpose under the CPA 1999.

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*Whether The CCT Have The Jurisdiction To Decide On An Issue Relating To Fees Which Are Governed By The Contract Between The School And The First Respondent?*

**[29]** In the light of the above finding, the question must also be answered in the negative. However, even if the CCT have the jurisdiction to decide on the fee issue, can it be said that the decision of the CCT is plainly irrational.

**[30]** In the award, the president of the CCT had concluded that the first respondent failed to give the requisite notice to the applicant for the withdraw of his two sons from the school; he also held that there is no provision entitling the applicant to forfeit the whole deposit. The decision is flawed because section 7 of the application form expressly stipulates that one term's notice must be given and that in default, the deposit will be forfeited. In fact, this provision is also repeated in the parental declaration form dated 24 July 2009 signed by the first respondent. In all the circumstances, the decision of the CCT flies against the facts; it is a decision that is plainly unsupportable and which fails the *Wednesbury* unreasonableness test.

**[31]** For the foregoing reasons, the court issued a *certiorari* quashing the CCT's award and make a declaration that the CCT has no jurisdiction to hear any matters relating to private educational institutions as they are governed by the EA 1996.